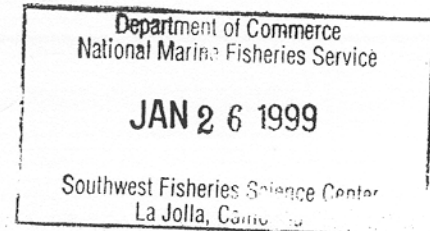


MARINE MAMMAL COMMISSION
4340 EAST-WEST HIGHWAY, ROOM 905
BETHESDA, MD 20814

Postmarked

8 January 1999

Michael F. Tillman, Ph.D.
Director
Southwest Fisheries Science Center
National Marine Fisheries Service
P.O. Box 271
La Jolla, CA 92038-0271



Dear Dr. Tillman:

Thank you for inviting representatives of the Marine Mammal Commission to participate in the 16-17 December 1998 meeting to review research being conducted under the International Dolphin Conservation Program Act (IDCPA) and discuss Dr. Daniel Goodman's proposed decision analysis. Our representatives came away from the meeting impressed that the National Marine Fisheries Service has committed considerable scientific talent of a very high caliber to conducting and analyzing the results of the research called for by the Act. It was also clear, however, that the Service will have limited information available to it for making the initial finding on the effects of chase and encirclement in March 1999.

As explained by the Commission's representatives at the meeting, the Marine Mammal Protection Act establishes the procedures under which the Commission formulates its recommendations. In particular, section 203 of the Act requires the Commission to consult with its Committee of Scientific Advisors before making any such recommendation. Thus, while the Service may have hoped to satisfy the consultative requirements of the IDCPA, at least in part, by inviting Commission representatives to participate in the meeting, this was not possible. Those requirements can be met only after the Commission has in hand the Service's proposals and carries out the mandated consultations with its Committee of Scientific Advisors. As noted at the meeting, the Commission will make every effort to complete its review of the Service's research proposals and proposed decision analysis as quickly as possible, but as a starting point we need something in writing to which the Commission and Committee members can react.

Although the Commission is not in a position to comment on the specifics of the proposed decision analysis framework until we have received a concrete proposal and have consulted with the Committee of Scientific Advisors, we strongly support the

Service's efforts to establish criteria beforehand as to what would constitute a significant adverse impact on a depleted dolphin stock. One point that needs to be addressed in the proposal that is provided for Commission review is what value would be used for the estimated maximum growth rate (R_{\max}) of dolphin populations. At the La Jolla meeting, two values (3% and 4%) were discussed, but it is not clear that any consensus was ever reached as to which is more appropriate.

On a related point, it was suggested by one participant that the Service undertake an analysis of the legislative intent behind the term "significant adverse impact," similar to one done on the term "zero mortality rate goal." The Commission staff has taken a preliminary look at the issue and does not believe that a more detailed review would be useful. The requirements for the research program and the Secretarial findings were added as part of a last minute legislative compromise. As such, they are not addressed in any of the committee reports that accompanied the legislation. Therefore, the only pertinent legislative history is that contained in floor statements and contemporaneous extensions of remarks and these carry much less weight with a reviewing court than does a committee report.

In this case, only two members of Congress specifically addressed the definition of "significant adverse impact" for purposes of the IDCPA. Congressman George Miller stated during debate on the bill that "[t]he scientists tell us that these dolphin populations should be growing at 4-6 percent annually, and that anything else should be considered a significant adverse impact." A similar statement was made by Congressman Delahunt as an extension of remarks. He stated:

Mr. Speaker, the bill does not include a definition of the term "significant adverse impact," but it is my understanding that it would include any impact that retards or impedes the recovery of the depleted dolphin stocks. For example, in the recovery of the grey [sic] whale, scientists observed population growth rates of between 4 to 6 percent. Similar growth rates are expected in the depleted dolphin stocks. Therefore, if the study shows that the depleted stocks of dolphins are not growing at the expected rates of 4 to 6 percent, I presume the Secretary will be required to make a finding that chase and encirclement is having a significant adverse impact on the dolphins and the label will not change.

While these statements should be considered by the Service in its formulation of what constitutes a significant adverse impact, we caution that these statements may not be representative of Congressional intent as a whole.

The Commission also believes that the Service should give some thought as to how it will publish the decision analysis framework once it has been finalized. While there likely will not be time to solicit public comment on the framework before the initial determination is to be made in March, the framework probably should be published before then either as an interpretive rule or as a policy statement.

The International Dolphin Conservation Program Act requires the Secretary of Commerce to determine whether the "intentional deployment on or encirclement of dolphins with purse seine nets is having a significant adverse impact on any depleted dolphin stock in the eastern tropical Pacific Ocean." As the Commission has noted in previous correspondence, it is not entirely clear from the statutory language or its legislative history which stocks are to be included in the determination. While it is apparent that the two stocks designated as depleted under section 115, the northeastern offshore spotted dolphin and the eastern spinner dolphin, are to be factored into the determination, it is unclear whether the coastal spotted dolphin stock, which was found to be depleted in a 1980 rulemaking and which, along with eastern spinner dolphins, was treated differently than other dolphin stocks in subsequent legislation, should also be assessed. The Commission concurs with the Service's preliminary decision noted at the La Jolla meeting to act conservatively by including the coastal spotted dolphin in the Secretarial determinations.

As was discussed at the La Jolla meeting, including coastal spotted dolphins creates certain problems, inasmuch as historical information on the abundance of this stock is less complete than for offshore stocks. This being the case, the Commission believes that the Service should consider using an alternative approach for making a determination concerning this stock. It may be that coastal spotted dolphins are set on so infrequently that one can assume that, even if individuals suffer significant adverse impacts from chase and encirclement, those impacts do not have adverse consequences at the population level. The Commission therefore recommends that, as part of the analysis of the effects of chase and encirclement on coastal spotted dolphins, the Service obtain and review information concerning the frequency with which sets are made on this stock and the numbers of coastal spotted dolphins that are chased and encircled, relative to the estimated stock size.

It is our understanding that the review of stress-related literature mandated by the IDCPA is nearly complete. Although not specified explicitly in the Act, the apparent purpose of this review is to determine, in advance of the March 1999 decision point, whether the results of stress-related studies in marine mammals and other vertebrates, including humans, provides

insights into whether physical and psychological stress, as might be caused by chase and encirclement, could reduce the survival or productivity of dolphins. Thus, the Commission believes that the results of the literature review should be made available for public review and comment prior to the March deadline for making the initial finding. If this cannot be done, the Commission requests that the Service advise us as to when the review will be completed and made available for review and indicate how the review will be used in making the initial determination in March.

As noted at the La Jolla meeting, the Commission continues to be concerned about the scheduling of the necropsy studies mandated by the IDCPA. Although not explicit in the legislation, the Commission believes that Congressional intent was for the assessment of "a 3-year series of necropsy samples" to have begun in January 1998 so that at least preliminary information would be available for consideration as part of the March 1999 determination. While progress has been made in arranging for the training and placement of technicians to collect necropsy samples, samples have yet to be collected. Additionally, it is our understanding that the sampling and necropsy protocols have yet to be completed. If this is the case, every effort should be made to complete the draft protocols as quickly as possible, secure review by the Commission and, as appropriate, outside experts, and begin collecting samples.

The discussion of the necropsy study at the La Jolla meeting indicated that, at this stage, the Service plans to conduct a "pilot" necropsy study to assess the feasibility of undertaking the full study envisioned by Congress. If the results are promising, the Service intends to place a sufficient number of technicians on board tuna vessels to collect the equivalent number of samples that would have been collected during the three-year study, albeit in a shorter period of time. If, however, the results of the pilot study suggest that the full study is not worth pursuing, the Service intends to go back to Congress for additional instructions as to how to proceed. In either case, the action to be taken by the Service, while not unreasonable, appears to deviate from the legislative directive of the IDCPA. The Commission therefore recommends that, if it has not already done so, the Service promptly inform the appropriate Congressional oversight committees of its plans and the rationale for deviating from the legislative language.

The IDCPA also directs the Service to conduct a one-year review of "relevant historical demographic and biological data" related to depleted dolphins. The presentation at the La Jolla meeting regarding this review demonstrates that considerable thought has gone into the possible ways in which indications of stress may be gleaned from archived samples and from those being collected in conjunction with the abundance surveys and other projects. The Commission believes that many of the Service's

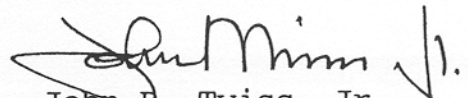
proposed studies are innovative and we look forward to consulting on the protocols being developed for these studies.

As with the necropsy study, our primary concern regarding the historical data project is its timing. Although a schedule is not specifically delineated in the legislation, it is not unreasonable to conclude that, inasmuch as this was to be a one-year review based on information that was already available or on analyses of samples that were already archived, Congress had an expectation that at least some results would be available in time to be factored into the March 1999 finding. This does not seem likely.

As noted above, at least some members of Congress probably expected that more information from the various studies would be available in time to be factored into the initial determination than is likely to be the case. As it is, the initial determination will rest largely on the results of the 1998 dolphin abundance survey. Congress should be informed that this is the case. The Commission therefore recommends that the Service provide Congress with a status report on the research being conducted under the IDCPA, including a summary of the analyses that are planned and a schedule of when the results are expected to be available. This should be done as quickly as possible to enable members to assess the basis upon which the Secretarial determination will be made and to consider any remedial legislation they may think warranted.

I hope that these thoughts are helpful. Please call me if you have any questions or would like to discuss any of these points further.

Sincerely,

A handwritten signature in dark ink, appearing to read "John R. Twiss, Jr.", with a stylized flourish at the end.

John R. Twiss, Jr.
Executive Director

cc: Robert L. Brownell, Jr., Ph.D.
Ms. Hilda Diaz-Soltero
Stephen B. Reilly, Ph.D.